

In the Supreme Court of the State of Alaska

N.D.,

Petitioner,

v.

Kenneth Gross and Nancy White,
Respondents.

Supreme Court No. **S-17756**

Order

Petition for Review

Date of Order: **4/10/2020**

Trial Court Case No. 3AN-16-02707PR

Before: Bolger, Chief Justice, Winfree, Stowers, Maassen, and Carney,
Justices

On consideration of the Petition for Review filed on 3/19/2020, and the response filed on 4/2/2020,

IT IS ORDERED:

1. The Petition for Review is **GRANTED** and the Civil Rule 35(a) mental examination ordered by the superior court is **STAYED** pending an expedited resolution of the issues raised by the petition for review.

2. The parties shall file a joint excerpt of record on or before **5/11/2020** and shall file serve it on participating amici noted in paragraph 3.

3. Following filing and service of the joint excerpt of record, the Petitioner's brief notice will issue. Formal briefs conforming to Appellate Rule 212 and excerpts conforming to Appellate Rule 210 shall be filed. Briefing and excerpting shall proceed on the expedited schedule prescribed in Appellate Rule 218. Briefing is requested on the questions set forth in the petition for review and at least the following questions:

- a. What is the difference, if any, in substance or scope between the AS 13.26.241(a) "interview" for ascertaining the respondent's capacity to make informed care and treatment decisions and the mental examination for other kinds of capacity that appears to be contemplated in AS 13.26.226(c) and AS 13.26.241(a)?

- b. Does the second sentence in AS 13.26.241(a) state an exception to the right to refuse to respond that is stated in the first sentence? Is the examination ordered by the superior court in this case an “interview” regarding the respondent’s “capacity to make informed decisions about care and treatment services,” that is, an interview that is covered by this second sentence?
- c. AS 13.26.241(b) states that a respondent has the right to refuse to answer questions if the answers may tend to incriminate the respondent. Is this statement an explanation of the right to refuse stated in subsection (a)? Or is the right to avoid self-incrimination stated in subsection (b) in addition to the right to refuse stated in subsection (a)? Has the respondent in this case made any showing that his answers in the evaluation may tend to incriminate the respondent?
- d. What happens if a respondent is ascertained to lack capacity to make informed health care treatment decisions? In other words, can a court order a mental exam if the respondent lacks sufficient capacity to either consent and participate or refuse and not participate?

The court invites the State of Alaska, Department of Health & Social Services, Division of Senior & Disability Services, Adult Protective Services unit and The Disability Law Center to participate as amici in this matter.¹ They shall have 20 days to respond to the court regarding this invitation. Should either or both participate, the respective briefs will be due at the same time as the party whose position is supported.

5. Oral argument will be scheduled when the briefing is complete.

Entered at the direction of the court.

Clerk of the Appellate Courts

/s/ M. Montgomery

Meredith Montgomery

¹ Complete copies of the petition for review and response are transmitted to the prospective amici with a copy of this order.

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cc: Supreme Court Justices
Trial Court Judge
Probate Court Appeals Clerk
State of Alaska, Department of Law
The Disability Law Center

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The Disability Law Center of Alaska